enrichment. But it seems immaterial that the quasi-agent has not paid the premium, though that is one of the grounds of decision in the federal case. After ratification, consideration moves from the principal; before that, there seems no necessity for consideration except such assent upon the part of the quasi-agent as may keep the insurer's promise open.

In England, where there may be no withdrawal until there has been an opportunity for ratification,[14] the occurrence of the loss seems immaterial to prevent it. Even if, more properly, the agreement before ratification can be revoked,[15] the loss should not effect a revocation without direct communication between the parties. It is like a change in the market making an offer manifestly unprofitable to the offeror but not preventing acceptance by the offeree.[16] Even if the acceptance of an offer after an uncontemplated change in the situation would be fraudulent, it does not follow that ratification would be, since the unratified contract is more permanent than an offer. Since it purports to take effect immediately, it necessarily contemplates the possibility of such a change as loss of the property taking place before ratification.

SPECIFIC PERFORMANCE WITH ABATEMENT OF PURCHASE PRICE. — It is settled, as a general principle in equity, that where a vendor of land is unable to make a perfect title to all the land he has contracted to convey, the purchaser is entitled to a conveyance of such interests as the vendor may have, with an abatement of the purchase price proportionate to the deficiency.[1] It has been suggested as an explanation of this doctrine that the vendor, having asserted a title to the entirety, is now estopped to deny it.[2] But the decree cannot logically be based upon the assumption that the interest of the vendor is the entirety of the subject matter called for by the contract, since an abatement of the purchase money is allowed. It should be recognized that the court is, in fact, executing a contract the parties never made.[3] The justification lies in the great hardship upon a purchaser if he is left to his remedy at law, and the comparatively slight hardship upon the vendor in compelling him to convey part of that which he has contracted to convey for a compensation on approximately the basis contracted for by the parties.[4]

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[14] Bolton Partners *v.* Lambert, 41 Ch. D. 295; *In re* Tiedemann, [1899] 2 Q. B. 66.

[15] See 9 HARV. L. REV. 60.

[16] It was held in Dickinson *v.* Dodds, 2 Ch. D. 463, that knowledge by the offeree of the offeror's intention to revoke prevented acceptance. For criticisms of this case, see LANGDELL, SUMMARY OF THE LAW OF CONTRACTS, 245; WALD'S POLLOCK, CONTRACTS, 3 ed., 33.

[1] Hill *v.* Buckley, 17 Ves. 394; Barnes *v.* Woods, L. R. 8 Eq. 424. See Mortlock *v.* Buller, 10 Ves. 291, 315. The fact that there is a want of mutuality of remedy to such a contract has given pause to some courts. See Lawrenson *v.* Butler, 1 Sch. & Lef. 13, 18; Graham *v.* Oliver, 3 Beav. 124, 128. But it has not proved an insuperable objection. See FRY, SPECIFIC PERFORMANCE OF CONTRACTS, 5 ed., §§ 474, 475, 476.

[2] See Rudd *v.* Lascelles, [1900] 1 Ch. 815, 818.

[3] See Thomas *v.* Dering, 1 Keen 729, 746, 747; DART, VENDORS & PURCHASERS, 7 ed., 1079; FRY, SPECIFIC PERFORMANCE OF CONTRACTS, 5 ed., § 1268. The Scotch law refuses thus to make over a contract. See Stewart *v.* Kennedy, 15 App. Cas. 75, 102.

[4] This argument has a peculiar force in jurisdictions where in an action at law the

And it is conceived that the reason why the doctrine is not applied where the purchaser in contracting was aware of the defect [5] is not that his knowledge defeats an estoppel, but that there is less hardship in denying this extraordinary relief to a purchaser with knowledge of the hazard attending the vendor's ability to perform, than to a purchaser without such knowledge.[6] And so although the defect is known, where the vendor assures the purchaser of his ability to procure from a third person the concurrence necessary to a perfect title, the balance is in the purchaser's favor.[7] The authorities do not limit the application of the doctrine to cases where the deficiency is not very great.[8] Where, however, the value of the part the vendor is unable to convey is purely conjectural, such relief would mean not only the execution of a new contract, but compensation at a rate substantially different from that fixed by the parties, and is accordingly denied.[9]

A phase of this question which has given much difficulty arises where the vendor's wife refuses to release her right to dower. Several courts have treated this as a case for specific performance with an abatement or indemnity.[10] The purchaser has been protected in various ways. He has been allowed to retain or to have set aside a sufficient portion of the purchase money as an indemnity.[11] Other courts deduct from the purchase money the present cash value [12] of the inchoate right to dower.[13] The Wisconsin court adopted this view in a recent case. *O'Malley* v. *Miller*, 134 N. W. 840. By a view which has considerable support, and which, it is submitted, is most consonant with reason, the purchaser is denied specific performance with an abatement or indemnity except where the wife's refusal is procured by the husband,[14] on the ground that in a given case the value of the dower right is purely conjec-

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purchaser of land is not allowed damages for the loss of his bargain. Bain *v.* Fothergill, L. R. 7 H. L. 158.

[5] Castle *v.* Wilkinson, L. R. 5 Ch. 534; Lucas *v.* Scott, 41 Oh. St. 636. *Contra*, Walker *v.* Kelly, 91 Mich. 212, 51 N. W. 934.

[6] Peeler *v.* Levy, 26 N. J. Eq. 330.

[7] Barker *v.* Cox, 4 Ch. D. 464; Wilson *v.* Williams, 3 Jur. N. S. 810.

[8] Hooper *v.* Smart, L. R. 18 Eq. 683; Burrow *v.* Scammell, 19 Ch. D. 175.

[9] Bainbridge *v.* Kinnaird, 32 Beav. 346 (property subject to a contingent charge); Westmacott *v.* Robins, 4 De G., F. & J. 390 (property subject to forfeiture for breach of conditions); Rudd *v.* Lascelles, *supra* (property incumbered by restrictive covenants). See Cato *v.* Thompson, 9 Q. B. D. 616, 618.

[10] See POMEROY, CONTRACTS, 2 ed., §§ 460, 461, 462, 463.

[11] Wannamaker *v.* Brown, 77 S. C. 64, 57 S. E. 665 (vendor entitled to interest on part of purchase money retained); Bradford *v.* Smith, 123 Ia. 41, 98 N. W. 377 (vendor not entitled to interest on part of purchase money retained); Wilson *v.* Williams, *supra*. An early English case compelled the vendor to furnish indemnity at the suit of the purchaser. Milligan *v.* Cooke, 16 Ves. 1. Later English cases denied this right in the vendor. Balmanno *v.* Lumley, 1 Ves. & B. 224. See Paton *v.* Brebner, 1 Bligh 42, 66. In Wilson *v.* Williams, *supra*, the court apparently followed the one and disregarded the other without adverting to either. A case decided since Wilson *v.* Williams reasserts the doctrine of Balmanno *v.* Lumley. Bainbridge *v.* Kinnaird, *supra*.

[12] This is computed by ascertaining the present value of an annuity for the life of the wife equivalent to the interest in the third of the proceeds to which her contingent right of dower attaches and deducting therefrom the value of a similar annuity depending upon the joint lives of herself and husband. See Jackson *v.* Edwards, 7 Paige (N. Y.) 386, 408; GIAUQUE AND MCCLURE'S PRESENT VALUE TABLES, 6, 7.

[13] Woodbury *v.* Luddy, 14 All. (Mass.) 1; Martin *v.* Merrit, 57 Ind. 34.

[14] Young *v.* Paul, 10 N. J. Eq. 401.

tural; and that such relief necessitates a departure from the bargain entered into by the parties so great as to work an undue hardship on the vendor.[15]

INDIANS AND THE UNITED STATES. — On the discovery of America, the governments of the old world, to regulate among themselves the right of acquisition, adopted the principle that discovery should give title to the government under which it was made against all other European governments.[1] This principle, although vesting title to the soil in the nation which made the discovery, as against other European nations, was understood not to affect the right of the aboriginal inhabitants to occupancy, but merely to confer on the discoverer the exclusive right to purchase their lands.[2] By the various charters granted by the King of Great Britain, this title to the soil with the right of preëmption was vested in the colonies, continued in them after the establishment of their independence, and was ceded by them in most cases to the federal government,[3] which also by the Constitution was granted the exclusive power to regulate commerce with the Indian tribes.[4] The United States government continued to deal with the Indians by treaties, made as in the case of treaties with foreign nations,[5] and becoming the supreme law of the land.[6] The Indian tribes and nations were regarded as semi-independent communities, administering their own internal governments, but never from the first acknowledged as foreign states.[7] In 1871 this semi-independence was substantially repudiated by a statute providing that the United States should no longer deal with them by treaty.[8]

From the earliest times, however, the Indians have been regarded as wards of the United States, and the tribes as domestic dependent nations over which the United States might exercise full power of guardianship.[9] They may be governed by acts of Congress, as well as controlled by treaties.[10] Their land may be disposed of without their consent and no question of deprivation of vested rights without due process of law is thereby raised.[11] The constitutional power to regulate commerce with the Indian tribes applies wherever the tribes exist,[12] although their members have become citizens of a state and the commerce occurs out-

[15] Reilly *v.* Smith, 25 N. J. Eq. 158; Humphrey *v.* Clement, 44 Ill. 299. *Cf.* Kuratli *v.* Jackson, 118 Pac. 192 (Or.). The reasoning of the Pennsylvania court in Riesz's Appeal, 73 Pa. St. 485, that relief is refused because of the pressure it would exert on the wife seems unnecessary and is not persuasive.

[1] See Johnson *v.* M'Intosh, 8 Wheat. (U. S.) 543, 573.

[2] See Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 544.

[3] See Johnson *v.* M'Intosh, *supra*, 586.

[4] U. S. CONST., Art. 1, § 8. See Worcester *v.* Georgia, *supra*, 580.

[5] See Holden *v.* Joy, 17 Wall. (U. S.) 211, 242, 247.

[6] Fellows *v.* Blacksmith, 19 How. (U. S.) 366.

[7] Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1. It has been held that a state may purchase land by treaty from the Indians, under the supervision of the United States. Seneca Nation *v.* Christie, 126 N. Y. 122, 27 N. E. 275.

[8] U. S. REV. STAT., 1875, § 2079.

[9] See Cherokee Nation *v.* Georgia, *supra*, 17.

[10] United States *v.* Kagama, 118 U. S. 375, 6 Sup. Ct. 1109.

[11] Lone Wolf *v.* Hitchcock, 19 App. D. C. 315, aff'd in 187 U. S. 553, 23 Sup. Ct. 216.

[12] Adams *v.* Freeman, 50 Pac. 135 (Okl.).